Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1584

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC. and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

v.

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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No.

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC. and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

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PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Court of Appeals of the State of New York, dated February 7, 1978, affirming the judgment and order of the Supreme Court of the State of New York, County of New York, dismissing appellants' complaint. Appellants submit this jurisdictional statement to demonstrate that the Supreme Court of the United States has jurisdiction on direct appeal of this appeal and that a substantial federal question is presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated February 7, 1978, is reported officially at 43 N.Y. 2d 873 (1978), and has not as yet been reported in the unofficial reports. The decision of the Supreme Court of the State of New York, County of New York, is unreported. Copies of these opinions are set forth in the Appendix to this Statement, *infra*, pp. 1-a and 2-a.

Jurisdiction

Appellants commenced this action to obtain a declaratory judgment that subdivisions (15), (16) and (17) of Section 187 of the New York General Business Law, when enforced or subject to enforcement pursuant to Section 190 of said law, violate their federal and state constitutional rights to equal protection of the law, and to enjoin appellees from enforcing the challenged statute. A copy of the complaint is set forth in the Appendix to this Statement, *infra*, p.5-a.

After service of appellants' complaint, both appellees moved to dismiss the complaint. The Supreme Court of the State of New York, County of New York, granted appellees' motions and judgment was entered dismissing appellants' complaint.

Thereupon, appellants directly appealed to the Court of Appeals of the State of New York, which, by memorandum decision dated February 7, 1978, affirmed the judgment and order of the Supreme Court of the State of New York dismissing appellants' complaint.

A timely notice of appeal was filed by appellants with the Clerk of the Supreme Court of the State of New York, County of New York, on May 1, 1978. A copy of the notice of appeal is set forth in the Appendix to this Statement, *infra*, p. 15-a.

Statutes Involved

The New York Statutes involved are:

New York General Business Law Section 187, subdivisions (15), (16) and (17), which provide:

§ 187. Additional prohibitions

An employment agency shall not engage in any of the following activities or conduct:

* * * *

(15) Discriminate on the basis of sex.

(16) Require completion by the applicant of application forms which are designed for or require different information from members of a particular sex.

(17) Classify or otherwise act on applications for its services on the basis of the sex of the applicant, except in cases where an employer requests referrals for a position involving a bona fide occupational qualification on the basis of sex, as defined in Title VII of the Federal Civil Rights Law of 1964.[1]

[1] 42 U.S.C.A. § 2000e et seq.

The text of this statute is found at 19 N.Y. General Business Law at 51 (McKinney Supp. 1977-78);

New York General Business Law Section 190, which provides:

§ 190. Penalties for violations

Any person who violates and the officers of a corporation and stockholders holding ten percent or more of the stock of a corporation which is not publicly traded, who knowingly permit the corporation to violate sections one hundred seventy-two, one hundred seventy-three, one hundred seventy-six, one hundred eighty-four, one hundred eighty-four-a, one hundred eighty-five, one hundred

> eighty-five-a, one hundred eighty-six, or one hundred eighty-seven of this article shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed one thousand dollars, or imprisonment for not more than one year, or both, by any court of competent jurisdiction. The violation of any other provision of this article shall be punishable by a fine not to exceed one hundred dollars or imprisonment for not more than thirty days. Criminal proceedings based upon violations of these sections shall be instituted by the commissioner and may be instituted by any persons aggrieved by such violations.

The text of this statute is found at 19 N.Y. General Business Law at 53 (McKinney Supp. 1977-78); and

New York General Business Law Section 171, subdivisions (1), (2) and (3), New York General Business Law Section 189, subdivisions (1), (4) and (5) and New York Human Rights Law Section 296, subdivisions (1) (b) and (d), all of which are set forth in the Appendix to this Statement, *infra,* pp. 18-a, 20-a and 21-a, respectively.

Question Presented

Do subdivisions (15), (16) and (17) of Section 187 of the New York General Business Law, when enforced or subject to enforcement pursuant to Section 190 of said law deprive appellants of the equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution when such laws subject only licensed employment agencies to penal sanctions, including incarceration, for acts of sex discrimination, while excluding all other employment agencies and other persons similarly situate from such sanctions, for commission of the same unlawful act?

Jurisdiction of this appeal is conferred upon the Court by 28 U.S.C. §1257 (2).

Statement of the Case

New York currently licenses and regulates certain employment agencies by virtue of Article 11 of its General Business Law (§§ 170 *et seq.*) which law excludes from its coverage certain non-profit employment agencies, temporary help services, the state employment service, union hiring halls and employment agencies who deal exclusively in positions paying $20,000 or more per year and who charge only employers. The New York Human Rights Law makes it unlawful for these excluded persons, as well as licensed employment agencies, to discriminate on the basis of age, race, creed, color, national origin, sex, disability or marital status; and is uniformly applicable to all persons engaged in the employment process —whether for profit or non-profit and irrespective of whether or not they are required to be licensed as an employment agency under the General Business Law. The Human Rights Law is civilly and administratively enforced and contains no penal sanctions for any act of discrimination in employment on the basis of sex, or otherwise.

In 1976, Section 187 of the General Business Law was amended by the addition of subdivisions (15), (16) and (17), which prohibit licensed employment agencies from discriminating against applicants for employment on the basis of sex in the same manner as does the Human Rights Law. Under General Business Law Section 190, a violation of this prohibition subjects a licensed employment agency to a misdemeanor conviction punishable by a fine not to exceed $1,000 or imprisonment for not more than one year, or both, in addition to the administrative sanctions of revocation or suspension of the agency's license under General Business Law Section 189, subdivision (5).

Appellants, employment agencies duly licensed under the General Business Law, and the Association of Personnel Agencies of New York, the sole statewide trade association representing licensed employment agencies, commenced this action to obtain a declaratory judgment that subdivisions (15),

(16) and (17) of Section 187 of the General Business Law, when enforced or subject to enforcement pursuant to Section 190 of said law, violate their federal and state rights to equal protection of the law, and to enjoin appellees, the Industrial Commissioner of the State of New York and the Commissioner of Consumer Affairs of the City of New York, from enforcing the challenged statute.

After service of appellants' complaint, both appellees moved to dismiss the complaint. The Supreme Court of the State of New York, County of New York, granted appellees' motions and upheld the constitutionality of the challenged statute. On appeal, the Court of Appeals affirmed.

The Question is Substantial

Since 1945 it has been unlawful in New York by virtue of the Human Rights Law for employers, temporary help services, labor unions or employment agencies to discriminate on the basis of race, creed, color or national origin in the hiring or referring of persons for employment.[1] Since 1965 it has been unlawful to discriminate on the basis of sex.[2] These laws and their enforcement provisions are equally applicable to all those involved in the employment process, whether or not so engaged for profit, and whether or not required to be licensed to conduct such activities. The Human Rights Law is civilly and administratively enforced and contains no penal sanctions for any act of discrimination in employment on the basis of sex, or otherwise.

In 1976, the New York General Business Law which licenses and regulates certain selected employment agencies was amended[3] by adding to it a prohibition against discrimination on the basis of sex in the same manner as the Human Rights Law but with none of its other prohibitions. A

[1] L.1945, c.118. In 1958, age was added as a prohibited basis of discrimination (L.1958, c.738 § 1).

[2] L.1965, c. 516.

[3] L.1976, c. 814 § 1.

violation of this prohibition is a misdemeanor punishable by fine and/or incarceration.[4]

New York State has licensed and regulated certain employment agencies since 1903. The only employment agencies which are required to be licensed are those which either charge an applicant a fee or charge an employer a fee where the salary of the employee is under $20,000 per year, while exempt therefrom are certain non-profit employment agencies, temporary help services and employment agencies who deal exclusively in positions paying $20,000 or more per year and who charge only employers.[5] This license classification is wholly artificial and totally unrelated to the alleviation of employment discrimination based upon sex.[6]

All persons engaged in the employment process, whether they be employers, non-profit employment agencies, for profit employment agencies, the state employment service, labor unions, executive recruiters or temporary help services, perform the same functions in carrying out their activities (assisting others in finding employment or employees). All employment agencies, whether subject to the General Business Law licensing and regulatory requirements or exempt therefrom, are subject to the Human Rights Law which makes it unlawful for an employment agency to discriminate on the basis of age, race, creed, color, national origin, sex, disability or marital status.[7]

Thus under the statutory scheme at bar, created by two different New York laws accomplishing the same objective, two persons who commit the identical unlawful act of sex dis-

[4] New York General Business Law Section 190.

[5] New York General Business Law Sections 171(2)(a) and 171(2)(e).

[6] For example, the exemption for employer-fee charging employment agencies was originally established at salaries of $9,000 or more per year (L.1958, c.893§2) and was arbitrarily raised to salaries of $20,000 or more per year in 1975 (L.1975, c.632§1).

[7] New York Human Rights Law §296(1)(b).

crimination are subject to different penalties; the first one civil, and the other, both civil and criminal, including incarceration.

The 1976 New York General Business Law Amendment adding the prohibition only against sex discrimination in employment by duly licensed employment agencies subjects an employment agency, and its employees and principals, to arrest and imprisonment in addition to the administrative sanctions of fine and/or license suspension or revocation for a violation thereof.[8] This new law does not contain any prohibitions against any form of discrimination other than that based upon sex.

The Human Rights Law provides for equal treatment of all persons who offend its proscriptions. The General Business Law provides criminal penalties only against the small group of licensed employment agencies which are subject thereto.

The disparate penalty provisions of the General Business Law and Human Rights Law result in the owner, stockholder, officer or employee of an employment agency being subject to arrest and incarceration for an act of sex discrimination, while all other persons, including unlicensed fee and non-fee charging employment agencies, employers, the state employment service, temporary help services, and labor unions, are not subject to criminal penalties for committing the identical unlawful act.

It is an incongruent statutory scheme that exempts the principal (the employer) from criminal penalties while imposing criminal penalties upon some of its agents and their employees (the licensed employment agency) but not all of the agents it employs to secure employees. *See Eisenstadt* v. *Baird,* 405 U.S. 438, 449-50 (1972).

The appellees have not in the proceedings below offered any justification, rationale or legislative history to support the discriminatory classification at bar. Nothing has occurred since 1965, when the Human Rights Law was amended to make sex discrimination unlawful, to warrant imposing criminal sanctions

[8] New York General Business Law Sections 190 and 189(5).

and incarceration solely upon a tiny group out of all of the persons engaged in the employment process. The record is barren of any facts to justify the disparate treatment.[9]

The importance of this case transcends the rights of the appellants herein. New York has always been a leader in the adoption of remedial legislation designed to alleviate social injustices. In 1945, it was the first state to adopt a fair employment practices act. Now, without any legislative hearings, history or statistics, New York has become the first state to impose criminal penalties solely for an act of sex discrimination in employment and has imposed such penalties only when such acts are committed by a small group of people from among a huge group all engaged in the same activity. This is exactly the type of legislation the equal protection clause was intended to bar.

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Eisenstadt* v. *Baird,* 405 U.S. at 454 (quoting from *Railway Express Agency* v. *New York,* 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

This legislation, if upheld, could result in similar legislation being adopted as part of the employment agency laws of other states while being omitted from the generally applicable anti-discrimination statutes. Such legislation results in a tiny part of

[9] None of the evils referred to by Mr. Justice Brandeis in his dissent in *Adams* v. *Tanner,* 244 U.S. 590, 597 (1917) are any longer existent as the industry has progressed in response to the economic and social changes which have occurred in the United States since 1917.

the community being subjected to criminal sanctions to which the vast majority is not. Employment agencies are required to be licensed in 49 states and 42 states have laws against discrimination.

The question at bar is not whether New York may rationally impose criminal sanctions upon licensed employment agencies who commit an act of sex discrimination as was stated by the New York Court of Appeals. The question is whether a small segment of the public may be subject to harsher penalties for the commission of the same unlawful act than others similarly situate. The answer to this question is patent. As stated by Mr. Justice Douglas in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942):

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." 316 U.S. at 541 (citations omitted).

Appellants do not question the right of New York to regulate generally the operations of employment agencies. This case does not involve the issue of whether a particular evil may be legislated against on a piecemeal approach, but rather whether disparate penalties may be imposed for the identical unlawful act, creating two classes of citizens where all citizens are similarly engaged. The classifications at bar were initially adopted in 1958 before either the Human Rights Law or General Business Law barred sex discrimination in employment and were adopted in furtherance of the State's objective of regulating employment agencies. No such distinctions are contained in the Human Rights Law. It is thus evident that the statutory classification at bar rests upon criteria wholly unrelated to the alleviation of sex discrimination in employment and the disparities in treatment cannot be justified by any genuinely different characteristics of General Business Law licensed em-

ployment agencies, when compared with excluded employment agencies and other persons similarly situated such as employers, the state employment service, temporary help services, executive recruiters and labor unions.

This Court is presented with a case where two employment agencies can commit the identical act yet only the General Business Law licensed agency is subject to incarceration. This distinction is irrational, bears no reasonable relationship to the prevention of sex discrimination in employment, and is precisely the type of classification condemned by the guarantee of equal protection, even when this guarantee is measured by the most lenient standards.

This case is not one of "under inclusion" where the legislature, addressing a particular problem, has only imposed a regulatory law upon a certain group. Here, the Human Rights Law applies to all and has declared sex discrimination unlawful. The General Business Law, however, has imposed a more severe penalty upon some, but not all of those already covered by the Human Rights Law statutory bar. Where the criminal act is the same it is a denial of equal protection to subject one group to greater penalties than another. *Skinner* v. *Oklahoma*.

Licensed employment agencies, no different than employers, temporary help services, executive recruiters, labor unions and the vast number of unlicensed employment agencies including those operated by the state government should not be subject to disparate treatment. Upholding different penalties for the same act can lead to statutory fragmentation in the enforcement of prohibitory regulations established for the public benefit. To uphold such provisions can lead to a legislative license to provide unequal treatment for equal citizens not intended to be permitted by the Constitution.

Conclusion

For the reasons set forth above, we submit that the question presented is significant and substantial and transcends the rights of appellants herein. The constitutionality of a statutory scheme, such as is presented herein, has not been directly passed upon by this Court. Accordingly, we request that probable jurisdiction be noted and that the matter be set down for argument.

Respectfully submitted,

A. Bernard Frechtman
Joel A. Klarreich
Attorneys for Appellants

May, 1978

APPENDIX

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., et al.,
Appellants,

v.

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, et al.,
Respondents.

Argued January 9, 1978; decided February 7, 1978

OPINION OF THE COURT

Memorandum.

We agree with Special Term that subdivisions (15), (16) and (17) of section 187 and section 190 of the General Business Law do not violate the equal protection clauses of the State and Federal Constitutions. It was not irrational for the Legislature to provide that those employment agencies which require special supervision and licensing by the State may be subject to penal sanctions if they engage in sexual discrimination or other specified illegal acts.

Accordingly, the judgment of Special Term, declaring the statutes constitutional, should be affirmed.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.

Judgment affirmed, with costs, in a memorandum.

OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., ALPHA EMPLOYMENT AGENCY OF SMITHTOWN, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC., SNELLING AND SNELLING OF UPPER MANHATTAN, INC., and WILLIAM BREWSTER ASSOCIATES, INC.,

Plaintiffs,

—*against*—

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and ELINOR GUGGENHEIMER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Defendants.

Index No. 23201/76
Memorandum

HUGHES, J.:

Defendants (Ross in #145 of January 24, 1977 and Guggenheimer in #16 of February 10, 1977) move to dismiss the complaint as a matter of law on the ground that it fails to state a cause of action. The plaintiffs seek a judgment (1) declaring that Section 187 (15), (16) and (17) of the General Business Law is unconstitutional when enforced or subject to enforcement under Section 190 of that law and (2) permanently enjoining defendants from enforcing such provisions for failure of plaintiffs to comply therewith.

General Business Law, Section 171(2), which defines an employment agency, excludes in subdivision e "(1) any employment bureau conducted by a duly incorporated bar association, hospital, association of registered professional nurses, registered medical institution, or by a duly incorporated association or society of professional engineers, or by a duly incorporated association or society of land surveyors, or by a duly incorporated association or society of registered architects; (2) any person who, on behalf of employers, procures or attempts to procure employees for class 'B' employment (as defined in section one hundred eighty-five of this article) where the first year's compensation for each such employment is twenty thousand dollars or more, and who in no instance charges a fee directly, or indirectly to persons seeking such employment even though a fee may be charged to employers seeking the services of such employees, and who engages in no activities constituting the operation of an employment agency, as herein defined; (3) any organization operated by or under the exclusive control of a bonafide nonprofit educational, religious, charitable or eleemosynary institution."

Section 172 requires that employment agencies obtain a license. Section 187 places prohibitions upon them including the following, which defendants are now challenging, "(15) Discriminate on the basis of sex. (16) Require completion by the applicant of application forms which are designed for or require different information from members of a particular sex. (17) Classify or otherwise act on applications for its services on the basis of the sex of the applicant, except in cases where an employer requests referrals for a position involving a bona fide occupational qualification on the basis of sex, as defined in Title VII of the Federal Civil Rights Law of 1964."

Plaintiffs also challenge Section 190, which contains criminal sanctions for violation of, inter alia, these subdivisions.

The gist of plaintiffs' complaint is that they as duly licensed employment agencies ("included employment agencies") have

been denied equal protection of the law because those restrictions and criminal sanctions are not also applied to the "excluded employment agencies."

There is a strong presumption of the constitutionality of statutes and courts should not strike a statute as unconstitutional unless such statute clearly violates the constitution (see McKinney's Book 1, Statutes, Section 150 and cases cited therein). There was a reasonable basis for the exclusions in Section 172(2)(e) which, in effect, exempted those there specified from a need to secure a license and certainly no successful challenge has been made thereto. The instant case seeks to have stricken down as constitutionally violative of the equal protection clauses of the state and federal constitutions the legislative application to licensed employment agencies of the restrictions relating to sex discrimination of Section 187 (15), (16) and (17) and the resultant application of the criminal sanctions of Section 190.

While on a motion of this character the complaint should receive the benefit of every available inference to resist dismissal, I find that the plaintiffs have failed to sustain the heavy burden resting upon them of showing that the legislation is violative of the constitution. It may be noted that the excluded agencies can be penalized for any sex discriminatory activity under the Executive Law (see Sections 292, 296[b] and 299).

Accordingly the motions are granted.

Settle order.

Dated: February 24, 1977.

s/ THOMAS J. HUGHES
J. S. C.

APPELLANTS' COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., ALPHA EMPLOYMENT AGENCY OF SMITHTOWN, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC., SNELLING AND SNELLING OF UPPER MANHATTAN, INC., and WILLIAM BREWSTER ASSOCIATES, INC.,

Plaintiffs,

—against—

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and ELINOR GUGGENHEIMER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Defendants.

Index No.

COMPLAINT

Plaintiffs, by their attorneys, Frechtman Shadlen & Klarreich P.C. complaining of the defendants herein, allege:

1. Plaintiff ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC. (hereinafter referred to by its acronym "APANY") is a duly incorporated New York Not-For-Profit corporation having its principal place of business at 170 Broadway, City, County and State of New York, all of whose members are duly licensed to operate employment agencies under and by virtue of the provisions of Article 11 of the General Business Law of the

State of New York and are conducting such businesses in the State of New York.

2. Defendant PHILIP ROSS, is the Industrial Commissioner of the State of New York.

3. Defendant ELINOR GUGGENHEIMER, is the Commissioner of Consumer Affairs of the City of New York.

4. The laws of the State of New York impose upon both of the defendants the duty, within their respective jurisdictions, to enforce the laws of this State hereinafter specifically set forth; to prosecute violations of such laws; and to enforce or seek application in the courts of this State, of the penalties provided by such laws. Upon information and belief, defendants intend to enforce and seek enforcement of all of the provisions of such laws.

5. Plaintiff ALPHA EMPLOYMENT AGENCY OF SMITHTOWN, INC. (hereinafter referred to as "Alpha") is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at 222 East Main Street, County of Suffolk, State of New York, and is duly licensed by the defendant Philip Ross, Industrial Commissioner of the State of New York (hereinafter referred to as the "Industrial Commissioner") to operate an employment agency pursuant to Article 11 of the General Business Law of the State of New York and currently operates an employment agency at its said principal place of business.

6. Plaintiff DON WALDRON & ASSOCIATES, INC. (hereinafter referred to as "Waldron") is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at 10 East 40th Street, City, County and State of New York and is duly licensed by the defendant, Elinor Guggenheimer Commissioner of Consumer Affairs of the City of New York (hereinafter referred to as the "Commissioner of Consumer Affairs") to operate an employment agency pursuant to Article 11 of the

General Business Law of the State of New York, and currently operates an employment agency at its said principal place of business.

7. Plaintiff PRESTON ASSOCIATES, INC. (hereinafter referred to as "Preston") is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at 11 East 44th Street, City County and State of New York, and is duly licensed by defendant Commissioner of Consumer Affairs to operate an employment agency pursuant to Article 11 of the General Business Law of the State of New York and currently operates an employment agency at its said principal place of business.

8. Plaintiff SNELLING AND SNELLING OF BINGHAMTON, INC., (hereinafter referred to as "Snelling and Snelling—Binghamton") is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located at 66 Hawley Street, County of Broome, State of New York, and is duly licensed by defendant Industrial Commissioner to operate an employment agency pursuant to Article 11 of the General Business Law of the State of New York, and currently operates an employment agency at its said principal place of business.

9. Planitiff SNELLING AND SNELLING OF UPPER MANHATTAN, INC. (hereinafter referred to as "Snelling and Snelling—Upper Manhattan") is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located at 18 East 41st Street, City, County and State of New York, and is duly licensed by the defendant Commissioner of Consumer Affairs to operate an employment agency pursuant to Article 11 of the General Business Law of the State of New York and currently operates an employment agency at its said principal place of business.

10. Plaintiff WILLIAM BREWSTER ASSOCIATES, INC. (hereinafter referred to as "Brewster") is a corporation duly or-

ganized and existing under and by virtue of the laws of the State of New York, with its principal place of business located at 576 Fifth Avenue, City, County and State of New York, and is duly licensed by defendant Commissioner of Consumer Affairs to operate an employment agency pursuant to Article 11 of the General Business Law of the State of New York and currently operates an employment agency at its said principal place of business.

11. Plaintiffs ALPHA, WALDRON, PRESTON, SNELLING AND SNELLING—BINGHAMTON, SNELLING AND SNELLING—UPPER MANHATTAN and BREWSTER, and APANY's members, as duly licensed employment agencies, have been and still are subject to all of the provisions of Sections 170 to 190, inclusive, of the General Business Law of the State of New York.

12. Plaintiff APANY's members are approximately 300 duly licensed employment agencies, all of whom enjoy excellent reputations and render efficient and dependable service to all who seek their assistance. The purposes of plaintiff, APANY, are, *inter alia,* to set a high standard in the employment agency business, establish public confidence in the industry, protect its members, protest and judicially challenge any law, rule, regulation, order, requirement, pronouncement and directive which is unauthorized by law or unconstitutional and detrimental to the welfare of its members and the employment agency industry and to challenge any unauthorized or unconstitutional treatment of or practice among its members.

13. Approximately 1,400 employment agencies doing business in the State of New York are affected by the laws challenged herein and will be affected by the relief sought herein.

14. The laws of the State of New York complained of in this action are Sections 187, subdivisions 15-17, inclusive, and 190 of the General Business Law (hereinafter collectively referred to as the "Laws Complained Of").

15. The LAWS COMPLAINED OF expressly apply only to employment agencies which are operated, governed, licensed and regulated pursuant to Article 11 of the General Business Law of the State of New York and which are specifically defined in Section 171.2 of the General Business Law, as follows:

> "2. a. 'Employment agency' means any person (as hereafter defined) who, for a fee, procures or attempts to procure:
>
> (1) employment or engagements for persons seeking employment or engagements, or
>
> (2) employees for employers seeking the services of employees.
>
> b. 'Employment agency' shall include any person engaged in the practice of law who regularly and as part of a pattern of conduct, directly or indirectly, recruits, supplies, or attempts or offers to recruit or supply, an employee who resides outside the continental United States (as defined in section one hundred eighty-four a of this article) for employment in this state and who receives a fee in connection with the arrangement for the admission into this country of such workers for employment.
>
> c. 'Employment agency' shall include any person who renders vocational guidance or counselling services and who charges a fee, all or any part of which is in consideration of such person procuring or attempting to procure employment or engagements for persons seeking employment or engagements.
>
> d. 'Employment agency' shall include any nurses' registry and any theatrical employment agency (as hereinafter defined).
>
> e. 'Employment agency' shall not include: (1) any employment bureau conducted by a duly incorporated bar

association, hospital, association of registered professional nurses, registered medical institution, or by a duly incorporated association or society of professional engineers, or by a duly incorporated association or society of land surveyors, or by a duly incorporated association or society of registered architects; (2) any person who, on behalf of employers, procures or attempts to procure employees for class 'B' employment (as defined in section one hundred eighty-five of this article) where the first year's compensation for each such employment is twenty thousand dollars or more, and who in no instance charges a fee directly, or indirectly to persons seeking such employment even though a fee may be charged to employers seeking the services of such employees, and who engages in no activities constituting the operation of an employment agency, as herein defined; (3) any organization operated by or under the exclusive control of a bonafide nonprofit educational, religious, charitable or eleemosynary institution."

Class "B" employment is defined in Section 185 of the General Business Law as "commercial, clerical, executive, administrative and professional employment, all employment outside the continental United States and all other employment not included in classes 'A', 'A1', 'C' and 'D'.

16. All the plaintiffs, except APANY, are duly licensed employment agencies entitled, as such, to open, keep, maintain, own, operate, or carry on an employment agency pursuant to Sections 170-177 of the General Business Law, and are therefore subject to the provisions and sanctions of the LAWS COMPLAINED OF.

17. Other persons, similarly situated, are by virtue of Section 171 of the General Business Law, excluded from the application of the provisions and sanctions of the LAWS COMPLAINED OF.

18. Section 187, subdivisions 15-17 of the General Business Law of the State of New York, enacted into law on July 26, 1976, effective September 1, 1976, provide that:

"§187. Additional Prohibitions.

An employment agency shall not engage in any of the following activities or conduct:

* * *

15. Discriminate on the basis of sex.

16. Require completion by the applicant of application forms which are designed, for or require different information from members of a particular sex.

17. Classify or otherwise act on applications for its services on the basis of the sex of the applicant, except in cases where an employer requests referrals for a position involving a bona fide occupational qualification on the basis of sex, as defined in Title VII of the Federal Civil Rights Law of 1964."

19. Section 190 of the General Business Law provides that:

"Penalties for violations

Any person who violates and the officers of a corporation and stockholders holding ten percent or more of the stock of a corporation which is not publicly traded, who knowingly permit the corporation to violate sections one hundred seventy-two, one hundred seventy-three, one hundred seventy-six, one hundred eighty-four, one hundred eighty-four-a, one hundred eighty-five, one hundred eighty-five-a, one hundred eighty-six, or one hundred eighty-seven of this article shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine not to exceed one thousand dollars, or imprisonment for not more than one year, or both, by any court of competent

jurisdiction. The violation of any other provision of this article shall be punishable by a fine not to exceed one hundred dollars or imprisonment for not more than thirty days. Criminal proceedings based upon violations of these sections shall be instituted by the commissioner and may be instituted by any persons aggrieved by such violations."

20. Upon information and belief, there are certain persons, firms and corporations conducting business in the State of New York, who are, by virtue of Section 171.2.e.(2) of the General Business Law expressly excluded from application of the LAWS COMPLAINED OF and who, for a fee, on behalf of employers, procure or attempt to procure employees for class "B" employment, where the first year's compensation for each such employment is twenty thousand dollars or more, and do not charge a fee, directly or indirectly, to persons seeking such employment.

21. Upon information and belief, persons, firms and corporations other than those described in Paragraph 20 hereof, are similarly situated, having been determined to be employment agencies for purposes of Section 292 of the Executive Law, known as the Human Rights Law, and are nevertheless, by virtue of Section 171 of the General Business Law, exempt from the application of the LAWS COMPLAINED OF.

22. Other persons, firms and corporations similarly situated and performing identical functions as are persons subject either to Sections 170-190 inclusive of the General Business Law or to Sections 290-301 of the Executive Law, are not construed to be employment agencies for purposes of Section 171 of the General Business Law and hence are not subject to the application of the LAWS COMPLAINED OF.

23. The New York State Employment Service, the largest employment agency in this State, is excluded from application of the LAWS COMPLAINED OF.

24. None of the persons referred to in paragraphs 20 to 23 are subject to the criminal sanctions provided for in Section 190 of the General Business Law upon proof of commission of any act set forth in Section 187, subdivisions 15-17, inclusive, or of any similar act.

25. The creation by the Legislature of the foregoing arbitrary classification of persons subject to penal sanctions for sex discrimintion under Section 190 of the General Business Law and the exclusion by the Legislature of other employment agencies, other businesses and persons similarly situated, and other industries, employers and labor organizations from similar penalties for similar acts is arbitrary and capricious, and bears no reasonable relationship to the prevention of sex discrimination in employment, and is thus unconstitutional and void as violating Article I, Section 11 of the Constitution of the State of New York and the Fourteenth Amendment of the United States Constitution in that the LAWS COMPLAINED OF deny plaintiffs equal protection of the law.

WHEREFORE, plaintiffs pray for judgment:

(a) declaring that subdivisions (15), (16) and (17) of Section 187 of the General Business Law of the State of New York, when enforced or subject to enforcement pursuant to Section 190 of the General Business Law of the State of New York, and each of them, are null and void, unconstitutional and of no force and effect;

(b) permanently enjoining defendants, their successors and all persons acting under their direction from enforcing, pursuant to Section 190 of the General Business Law of the State of New York, subdivisions (15), (16) and (17) of the General Business Law and each of them, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character to recover from or impose upon or enforce against any of the plaintiffs (except plaintiff APANY) their officers, agents or employees or any of them any criminal

penalty pursuant to Section 190 of the General Business Law for failure or refusal to obey, observe or comply with the provisions of said sections; and

(c) for such other and further relief as to the Court may seem just, proper and equitable.

Dated: December 20, 1976

Yours, etc.,

FRECHTMAN SHADLEN &
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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., ALPHA EMPLOYMENT AGENCY OF SMITHTOWN, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC., SNELLING AND SNELLING OF UPPER MANHATTAN, INC., and WILLIAM BREWSTER ASSOCIATES, INC.,

Plaintiffs-Appellants,

—against—

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Defendants-Respondents.

Notice of Appeal to the Supreme Court of the United States Index No. 23201/1976

PLEASE TAKE NOTICE, that the Association of Personnel Agencies of New York, Inc., Don Waldron & Associates, Inc., Preston Associates, Inc., Snelling and Snelling of Binghamton, Inc., and Snelling and Snelling of Upper Manhattan, Inc., the plaintiffs-appellants above-named, hereby appeal to the Supreme Court of the United States from the decision of the Court of Appeals of the State of New York, dated February 7, 1978, affirming the judgment of the Supreme Court of the State of

New York, County of New York, dismissing plaintiffs-appellants' complaint, entered in the office of the Clerk of the County of New York on February 10, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

A. BERNARD FRECHTMAN
JOEL A. KLARREICH

By: s/ A. BERNARD FRECHTMAN
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122 East 42nd Street
New York, New York 10017
(212) 661-8050

Filed: May 1, 1978, New York County Clerk's office.

CERTIFICATE OF SERVICE

I, JOEL A. KLARREICH, one of the attorneys for the Plaintiffs-Appellants herein, and a member of the Bar of the Supreme Court of the United States and of the State of New York, hereby certify and affirm that on this 1st day of May, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on the Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, Attorney for Defendant-Respondent Philip Ross and on Allen G. Schwartz, Corporation Counsel of the City of New York, Municipal Building, New York, New York 10007, Attorney for Defendant-Respondent Bruce C. Ratner, by mailing a copy in a duly addressed envelope, with postage prepaid.

I further certify and affirm that all parties required to be served have been served.

s/ JOEL A. KLARREICH
JOEL A. KLARREICH

ADDITIONAL STATUTES INVOLVED

New York General Business Law Section 171,
subdivisions (1), (2) and (3).

§171. Definitions

Whenever used in this article:

1. "Commissioner" means the industrial commissioner of the state of New York, except that in the application of this article to the city of New York the term "commissioner" means the commissioner of consumer affairs of such city.

2. a. "Employment agency" means any person (as hereinafter defined) who, for a fee, procures or attempts to procure:

(1) employment or engagements for persons seeking employment or engagements, or

(2) employees for employers seeking the services of employees.

b. "Employment agency" shall include any person engaged in the practice of law who regularly and as part of a pattern of conduct, directly or indirectly, recruits, supplies, or attempts or offers to recruit or supply, an employee who resides outside the continental United States (as defined in section one hundred eighty-four-a of this article) for employment in this state and who receives a fee in connection with the arrangement for the admission into this country of such workers for employment.

c. "Employment agency" shall include any person who renders vocational guidance or counselling services and who charges a fee, all or any part of which is in consideration of such person procuring or attempting to procure employment or engagements for persons seeking employment or engagements.

d. "Employment agency" shall include any nurses' registry and any theatrical employment agency (as hereinafter defined).

e. "Employment agency" shall not include: (1) any employment bureau conducted by a duly incorporated bar association, hospital, association of registered professional nurses, registered medical institution, or by a duly incorporated association or society of professional engineers, or by a duly incorporated association or society of land surveyors, or by a duly incorporated association or society of registered architects; (2) any person who, on behalf of employers, procures or attempts to procure employees for class "B" employment (as defined in section one hundred eighty-five of this article) where the first year's compensation for each such employment is twenty thousand dollars or more, and who in no instance charges a fee directly, or indirectly to persons seeking such employment even though a fee may be charged to employers seeking the services of such employees, and who engages in no activities constituting the operation of an employment agency, as herein defined; (3) any organization operated by or under the exclusive control of a bonafide nonprofit educational, religious, charitable or eleemosynary institution.

3. "Fee" means any thing of value, including any money or other valuable consideration charged, collected, received, paid or promised for any service, or act rendered or to be rendered by an employment agency, including but not limited to money received by such agency or its emigrant agent which is more than the amount paid by it for transportation, transfer of baggage, or board and lodging on behalf of any applicant for employment.

The text of this statute is found at 19 N.Y. General Business Law at 38-39 (McKinney Supp. 1977-78).

New York General Business Law Section 189,
subdivisions (1), (4) and (5).

§189. Enforcement of provisions of this article

1. This article shall be enforced by the industrial commissioner, except that in the city of New York this article shall be enforced by the commissioner of consumer affairs of such city.

* * * *

4. Complaints against any such licensed person shall be made orally or in writing to the commissioner, or be sent in an affidavit form without appearing in person, and may be made by recognized employment agencies, trade associations, or others. The commissioner may hold a hearing on a complaint with the powers provided by section one hundred seventy-four of this article. If a hearing is held, reasonable notice thereof, not less than five days, shall be given in writing to said licensed person by serving upon the licensed person either personally, by mail, or by leaving the same with the person in charge of his office, a concise statement of the facts constituting the complaint, and the hearing shall commence before the commissioner with reasonable speed but in no event later than two weeks from the date of the filing of the complaint. The commissioner when investigating any matters pertaining to the granting, issuing, transferring, renewing, revoking, suspending or cancelling of any license is authorized in his discretion to take such testimony as may be necessary on which to base official action. When taking such testimony he may subpoena witnesses and also direct the production before him of necessary and material books and papers. A daily calendar of all hearings shall be kept by the commissioner and shall be posted in a conspicuous place in his public office for at least one day before the date of such hearings. The commissioner shall render his decision within thirty days from the time the matter is

finally submitted to him. The commissioner shall keep a record of all such complaints and hearings.

5. Following such hearing if it has been shown that the licensed person or his agent, employee or anyone acting on his behalf is guilty of violating any provision of this article or is not a person of good character and responsibility, the commissioner may suspend or revoke the license of such licensed person and/or levy a fine against such licensed person for each violation not to exceed five hundred dollars. Whenever such commissioner shall suspend or revoke the license of any employment agency, or shall levy a fine against such agency, said determination shall be subject to judicial review in proceedings brought pursuant to article seventy-eight of the civil practice law and rules. Whenever such license is revoked, another license or agency manager permit shall not be issued within three years from the date of such revocation to said licensed person or his agency manager or to any person with whom the licensee has been associated in the business of furnishing employment or engagements. Deputy commissioners, or other officials designated to act on behalf of the commissioner, may conduct hearings and act upon applications for licenses, and revoke or suspend such licenses, or levy fines.

The text of this statute is found at 19 N.Y. General Business Law at 52-53 (McKinney Supp. 1977-78).

New York Human Rights Section 296,
subdivisions (1) (b) and (d).

§ 296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

* * * *

(b) For an employment agency to discriminate against any individual because of age, race, creed, color,

national origin, sex, or disability or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

* * * *

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin, sex, or disability or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sex, or disability or marital status.

The text of this statute is found at 18 N.Y. Executive Law at 115 (McKinney Supp. 1972-77).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-

No. 1584

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC., and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

against

PHILIP ROSS, As Industrial Commissioner of the State of New York, and BRUCE C. RATNER, Commissioner of Consumer Affairs of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEE PHILIP ROSS TO DISMISS OR AFFIRM

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IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEE PHILIP ROSS TO DISMISS OR AFFIRM

Appellee Philip Ross, Industrial Commissioner of the State of New York, moves pursuant to Rule 16 of the Rules of this Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Court of Appeals of the State of New York on the ground that it presents no substantial federal question.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated February 7, 1978, is officially reported at 43 N Y 2d 873. The opinion of the Supreme Court of the State of New York, County of New York, is unreported. These opinions are included in the Appendix to appellants' Jurisdictional Statement at pp. 1-a and 2-a, respectively.

Counterstatement of the Case

The State of New York has regulated the business of employment agencies since 1909. The employment agency law, Article 11 of the New York General Business Law ("GBL"), § 170 *et seq.*, was enacted to regulate the relations between employment agencies and applicants for employment and for the protection of the public in general from fraud. Employment agencies subject to regulation thereunder are essentially defined and classified on the basis of whether or not they charge a fee for their services. GBL § 171.2.

Appellants are four employment agencies subject to regulation under Article 11 of the GBL and their trade association. Their contention that they are denied equal protection of the laws is twofold:

(1) that GBL § 171.2 defines certain persons and businesses as "employment agencies" and subjects them to penal sanctions under GBL § 190 for engaging in sex discrimination as prohibited by GBL 187(15)-(17), while all other persons and businesses that engage in sex discrimination are subject only to the provisions of Article 15 of the New York Executive Law, known as the Human Rights Law ("HRL"), which allegedly does not include any penal sanctions.

(2) that GBL § 171.2(e) excludes from the definition of "employment agency", and thus from subjection to the penal sanctions that GBL § 190 applies to sex discrimination as prohibited by GBL § 187(15)-(17), certain persons and businesses that the HRL defines as "employment agencies."

The provisions of GBL, Article 11, which appellants challenge, subdivisions (15), (16) and (17) of § 187, were enacted by the New York State Legislature in Ch. 814 of the Laws of 1976, which became effective September 1, 1976.* These provisions generally prohibit employment agencies subject to Article 11 from discriminating on the basis of sex and also prohibit, as sex-discriminatory, certain activities regarding applications for the services of such employment agencies.

Prior to the effective date of the challenged provisions, employment agencies regulated by the State pursuant to GBL, Article 11, were subject to the penal sanctions contained in GBL § 190 if they engaged in any of the activities prohibited by Article 11 in GBL §§ 172, 173, 176, 184, 185, 186 and 187(1)-(14). Therefore, the acts of sex discrimination prohibited by GBL § 187 (15), (16) and (17) are simply additional grounds for the imposition of the penal sanctions already provided for in GBL § 190.**

---

* The challenged provisions are set forth in appellants' Jurisdictional Statement at pp. 3-4.

** The penal sanctions provided for in GBL § 190 as well as the classification of employment agencies subject to State regulation contained in GBL § 171 existed before the enactment of GBL § 187(15)-(17). Thus, the current opposition of appellant Association of Personnel Agencies of New York, Inc. ("APANY") to the application of the penal sanctions and the classification in the limited instance of sex discrimination is ironic. As recently as 1975, APANY opposed neither the classification nor the penal sanctions, but actually supported legislation that increased the penal sanctions to their present level. See 1975 McKinney's Session Laws p. 1763, Governor's Memorandum to Ch. 632 of the Laws of 1975.

The Supreme Court of the State of New York, County of New York, found that appellants had not sustained the heavy burden of showing that the challenged legislation violated the Constitutions of the United States and New York. The New York State Court of Appeals unanimously affirmed.

Argument

This Court has previously recognized that the regulation of employment agencies by the States is motivated by concern for the welfare of the public. *Olsen* v. *Nebraska ex rel. Western Reference Board Assn.*, 313 U.S. 236 (1941); *Brazee* v. *People of State of Michigan*, 241 U.S. 340 (1916). This Court has also noted and deplored the existence of unlawful discrimination on the basis of sex. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Since it is common knowledge that employment agencies like appellants that are subject to State regulation under the GBL deal with large numbers of women applicants in fee-generating situations, the very nature of appellants' business warrants their being subjected to rigorous standards of conduct and supports the decision of the New York State Legislature to make sex discrimination an additional ground for the criminal liability already provided for in GBL § 190.

There is no constitutional requirement, furthermore, that the GBL and the HRL treat discrimination on the basis of sex in identical fashion, for the two statutes serve different purposes and are clearly capable of coexistence. *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). The purpose of Article 11 of the GBL is to license and regulate employment agencies and to provide for sanctions against those acting under the law in violation of such an important safeguard. GBL § 170 *et seq.* The purpose of the HRL is to prohibit discrimination and provide administrative sanctions. HRL § 290. In addition, contrary to appellants' representations, the HRL does provide, in Executive Law § 299, penal sanctions which are applicable to employment agencies that wilfully violate an order of the State Division of Human Rights. The penal provisions contained in GBL § 190 apply not only to the sex discrimination prohibited by GBL § 187(15)-(17), but also to all the other prohibited acts set forth in Article 11 of the GBL in sections 172, 173, 176, 184, 185, 186 and 187(1)-(14).

It is abundantly clear that the "Equal Protection Clause does not require that every state regulatory statute apply to all in the same business." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957). If the statutory classification is reasonably related to the purpose of the act in which it is found, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . .; in the local economic sphere it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

Moreover, the mere fact that the GBL subjects only certain businesses functioning as employment agencies to criminal penalties does not amount to a constitutional violation. The concept of equal protection of the laws does not require the State to remedy every aspect of a problem or to apply its procedures with strict mathematical equality. *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970).

Thus, in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), this Court rejected a contention that an Oklahoma statute violated the Equal Protection Clause by exempting sellers of ready-to-wear glasses from a requirement that only licensed optometrists or opthalmologists could fit, duplicate or replace lenses. Similarly, in *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963), this Court held that a

Kansas statute excepting lawyers from a provision making it a misdemeanor to engage in the business of debt adjusting did not deny equal protection to non-lawyers.

It is well-settled that the type of legislation which is the subject of this action is "reasonable in relation to its subject and is adopted in the interests of the community." *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 397 (1937). This appeal, therefore, presents no substantial federal question for this Court's determination and should be dismissed.

CONCLUSION

The appeal should be dismissed or in the alternative the decision of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
May 19, 1978

Respectfully submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

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Appellants,

v.

PHILIP ROSS, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK and BRUCE C. RATNER, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

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In The

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

Appellants submit this response in opposition to Appellee Philip Ross' Motion to Dismiss the Appeal herein or in the

alternative to affirm the judgment of the Court of Appeals on the grounds that it presents no substantial federal question.

I.

Under the caption Counterstatement of the Case (p. 2) Appellee Ross states that the classification of employment agencies subject to the challenged statute is essentially determined on the basis of whether or not they charge a fee. This statement is erroneous. Exempt from the challenged statute are fee charging temporary help service businesses, union hiring halls, employment agencies who deal exclusively in positions paying $20,000 or more per year and who charge only employers and those persons described in General Business Law Section 171 Subdivisions 2(e)(1) and (3).[1]

II.

Under the caption Argument (p. 4) Appellee Ross states that those employment agencies which are subject to the challenged statute "deal with large numbers of women applicants in fee-generating situations" and urge this unsupported statement as justification for the imposition of criminal penalties on duly licensed employment agencies for an act of sex discrimination, implying that a special problem exists.[2] Appellants not only dispute the validity of this assertion, but contend that it bespeaks the question. Appellants do not question the right of the State of New York to license and regulate private employment agencies or even impose criminal sanctions for violations of the General Business Law. What Appellants question is the right of New York State to impose different penalties upon persons similarly situate for the commission of the identical unlawful act.

---

[1] Cited in its entirety in Appellants' Jurisdictional Statement, p. 19-a.

[2] The legislative record of the enactment of the challenged statute is wholly devoid of any supporting facts to justify the necessity for the application of criminal penalties for acts of sex discrimination.

Appellee Ross goes on to state under the caption Argument (p. 5) that the Human Rights Law does provide penal sanctions which are applicable to duly licensed employment agencies that wilfully violate an order of the State Division of Human Rights.[3] This statement is a distortion. No one is subject to penal sanctions for a violation of the Human Rights Law. Persons are subject to penal sanctions only for either wilfully interfering with the enforcement of the statute or wilfully violating an order of the State Division of Human Rights or its Commissioner.

III.

Appellee Ross urges under the caption Argument (pp. 4-5) that the statutes in question serve different purposes and are capable of coexistence and cites *Morton* v. *Mancari* and *Radzanower* v. *Touche Ross & Co.* as support therefor. These cases are inapposite. This is not a situation where there is a conflict between two statutes as was present in *Morton* v. *Mancari* and *Radzanower* v. *Touche Ross & Co.*, but rather a case where two statutes declare the same act unlawful and prescribe disparate penalties for persons similarly situate.

Appellee Ross then argues under the caption Argument (pp. 4-6) that a rational basis exists for the classification at bar as it is reasonable in relation to the purpose of the challenged statute and that "under inclusion" will not vitiate the statute.

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[3] Section 299 of the Human Rights Law provides as follows:

§ 299. Penal provision

Any person, employer, labor organization or employment agency, who or which shall wilfully resist, prevent, impede or interfere with the division or any of its employees or representatives in the performance of duty under this article, or shall wilfully violate an order of the division or commissioner, shall be guilty of a misdemeanor and be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

As Appellants stated in their Jurisdictional Statement (p. 11), the case at bar does not involve the question of "under inclusion." Here the act (sex discrimination) has been declared unlawful for all, yet only the duly licensed employment agency is subject to criminal penalties while all other persons similarly situate are exempt therefrom.

The Legislature, in adopting the Human Rights Law, has decreed that all persons are prohibited from discriminating on the basis of sex, including both licensed and unlicensed employment agencies, employers, temporary help services, executive recruiters and labor unions. The Legislature, in adopting the challenged statute, has imposed criminal sanctions for the very same unlawful act only upon a tiny percentage of the population without any legislative history, statistics or hearings. This it may not do under the Equal Protection Clause as it may not impose disparate penalties upon persons similarly situate for commission of the identical unlawful act.

CONCLUSION

For the reasons set forth above and those set forth in Appellants' Jurisdictional Statement, we submit that the question presented is significant and substantial and that Appellee Ross' motion to dismiss or in the alternative to affirm on the grounds that no substantial question is presented must be denied.

Respectfully submitted,

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